

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BORGER PROPERTIES, INC. et al.	§	
	§	
vs.	§	Case No. _____
	§	
AUER CORPORATION, et al.	§	

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

IN RE:	§	
	§	
BORGER PROPERTIES, INC.,	§	Case No. 10-20168-RLJ-11
	§	
Debtor.	§	

IN RE:	§	
	§	
WHEELER HOSPITALITY, INC.,	§	Case No. 10-20166-RLJ-11
	§	
Debtor.	§	

IN RE:	§	
	§	
BORGER HOSPITALITY, INC.,	§	Case No. 10-20170-RLJ-11
	§	
Debtor.	§	

IN RE:	§	
	§	
DECATUR HOSPITALITY, INC.,	§	Case No. 10-20171-RLJ-11
	§	
Debtor.	§	

NOTICE OF REMOVAL OF CIVIL ACTION AND MOTION TO TRANSFER VENUE

TO THE HONORABLE COURT:

BORGER PROPERTIES, INC., WHEELER HOSPITALITY, INC., BORGER HOSPITALITY, INC., and DECATUR HOSPITALITY, INC. (“Debtors”), defendants and counter-defendants in the above-captioned Adversary Proceeding, and debtors in the above-captioned Chapter 11 proceedings, respectfully file this Notice of Removal and Motion to Transfer Venue (“Notice of Removal”) in order to effectuate removal of *Borger Properties, Inc, et al v. Auer Corporation, et al.*, Case No. 09-01-00563, 9th District Court in and for Montgomery County, Texas, and place same on this Court’s docket as an Adversary Proceeding.

I.GROUNDS

A. NOTICE OF REMOVAL

i. Procedural Posture and Background

Debtors are corporations, more specifically single asset real estate entities, engaged in business in the hotel industry. During 2007 and 2008, Debtors, along with related entities Childress Hospitality, L.P., and Perryton Hospitality, Inc. (“Related Debtors”)¹, entered into contracts with Auer Corporation (“Auer”) whereby Auer agreed to act as the general contractor and construct 7 hotels for Debtors and Related Debtors. The hotels owned by Related Debtors (“Related Debtors’ Hotel Properties”) are located in Childress and Ochiltree Counties, Texas, both of which fall within the geographic jurisdiction of the Northern District of Texas. The hotels owned by Debtors (“Debtors’ Hotel Properties”) are located in Wise, Wheeler, Hutchinson and Snyder Counties, Texas, all of which fall within the geographic jurisdiction of the Northern District of Texas, as well as one hotel in Martin County, Texas, which falls within the geographic jurisdiction of the Western District of Texas.

1

A Motion for Joint Administration (“Motion”) is currently pending in Debtors’ and Related Debtors’ Chapter 11 cases, all pending in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division. Debtors anticipate that the Court will grant the Motion in the coming days.

j. _____

During construction of the 7 hotels, litigation associated therewith sprang up all across the Northern District of Texas. The majority of the litigation involves unpaid subcontractors, many of whom provided labor and materials on all of Debtors' and Related Debtors' Hotel Properties, seeking to foreclose on mechanic's liens against Debtors' and Related Debtors' Hotel Properties. Additionally, eight lawsuits between Auer, Debtors and Related Debtors were filed ("Auer Litigation"). Of the eight suits constituting the Auer Litigation, three were filed in, and one was procedurally manipulated by Auer into, the 9th District Court in Montgomery County, Texas ("Montgomery County Litigation"). Upon Debtors' filing this Notice of Removal, the Montgomery County Litigation became this Adversary Proceeding. The balance of this subsection is a more thorough explanation of the Montgomery County Litigation, as well as a recitation of the bankruptcy filings of Debtors.

k. On or about January 6, 2009, Debtor Borger Hospitality, Inc., filed suit against Auer Corporation ("Auer"), under Case No. 6192, in the 118th District Court in and for Martin County, Texas. This case was subsequently transferred to the 9th District Court in and for Montgomery County, Texas.

l. On or about January 20, 2009, Auer filed suit against Debtor Decatur Hospitality, Inc., under Case No. 09-01-00563, in the 9th District Court in and for Montgomery County, Texas.

m. On or about January 20, 2009, Auer filed suit against Debtor Wheeler Hospitality, Inc., and Toli, Inc., under Case No. 09-01-00564, in the 410th District Court in and for Montgomery County, Texas. This case was subsequently transferred to the 9th District Court in and for Montgomery County, Texas.

n. On or about January 20, 2009, Auer filed suit against Debtor Borger Properties, Inc., under Case No. 09-01-00565, in the 9th District Court in and for Montgomery County, Texas.

o. All of the above-referenced cases in Montgomery County were subsequently consolidated into a single action under Case No. 09-01-00563, in the 9th District Court in and for Montgomery County, Texas, styled as *Borger Properties, Inc., et al. v. Auer Corporation, et al.*, i.e. the Montgomery County Litigation.

p. On March 12, 2010, an order for relief under Chapter 11 of the United States Bankruptcy Code was entered in Chapter 11 Case No. 10-20166-RLJ-11, *In re Wheeler Hospitality, Inc.*, in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.

q. On March 12, 2010, an order for relief under Chapter 11 of the United States Bankruptcy Code was entered in Chapter 11 Case No. 10-20168-RLJ-11, *In re Borger Properties, Inc.*, in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.

r. On March 12, 2010, an order for relief under Chapter 11 of the United States Bankruptcy Code was entered in Chapter 11 Case No. 10-20170-RLJ-11, *In re Borger Hospitality, Inc.*, in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.

On March 12, 2010, an order for relief under Chapter 11 of the United States Bankruptcy Code was entered in Chapter 11 Case No. 10-20171-RLJ-11, *In re Decatur Hospitality, Inc.*, in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.²

2 Debtors would note that Related Debtors also filed petitions under Chapter 11 of the Bankruptcy Code on March 12, 2010. *In re Childress Hospitality, L.P.*, Case No. 10-20169-RLJ-11, and *In re Perryton Hospitality, Inc.*, Case No. 10-20167-RLJ-11, are now pending

s. ii. Grounds for Removal

t. “A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.” 28 U.S.C. § 1452.

u. The bankruptcy court has original jurisdiction of this matter under 28 U.S.C. §§ 157(b) and 1334.

v. Upon removal of the state court action, this civil action is a core proceeding under 28 U.S.C. §§ 157(b)(2)(B), (E), (K) and/or (O).

w. This Adversary Proceeding alleges causes of action for breach of contract, declaratory judgment to invalidate mechanic’s liens on real property of the estate, foreclosure of mechanic’s liens on real property of the estate, appointment of a receiver and fraud.

— This Case is a Core Proceeding Pursuant to 28 U.S.C. § 157(b)(2)(B)

2. This Adversary Proceeding will have an impact on the allowance or disallowance of a claim against the estates, and will directly affect the estimation of claims for the purposes of confirming a plan under Chapter 11. See 28 U.S.C. § 157(b)(2)(B). The relief sought by Auer in this Adversary Proceeding, alleged monetary damages and foreclosure of Auer’s mechanic’s liens, is a contingent claim against the several estates. The allowance or disallowance of said claim will partially be determined by the outcome of this Adversary Proceeding. Debtors use the term “partially” because two of the debtor-parties to this Adversary Proceeding are also parties to the following adversary proceedings in the Northern District of Texas:

before the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.

a. *Borger Hospitality, Inc. v. Auer Corporation*, originally Case No. 23,283 in the 132nd District Court in and for Scurry County, Texas, now pending in the United States Bankruptcy Court for the Northern District of Texas, Lubbock Division, by virtue of that certain Notice of Removal filed contemporaneously with this Notice of Removal, and for which a Motion for Intra-District Transfer has been filed, seeking transfer of the case to the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division; and

3.

a. *Borger Properties, Inc. v. Auer Corporation and Raymond Teague*, originally Case No. 38,541 in the 84th District Court in and for Hutchinson County, Texas, now pending in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division, by virtue of that certain Notice of Removal filed contemporaneously with this Notice of Removal (collectively as “Northern District Adversaries”).

4. Any awards for or against Debtor Borger Hospitality, Inc., and Debtor Borger Properties, Inc. (collectively as the “N.D.Tex. Plaintiffs”) in this Adversary Proceeding must be reconciled with any awards in the Northern District Adversaries to calculate the amount of any asset of the estate, or allowed claim against the estate. Due to the amount of the damages alleged by Auer and the N.D.Tex. Plaintiffs, the estimation of any such asset or allowed claim will affect, if not completely control, the Chapter 11 plan formulation for the N.D.Tex. Plaintiffs. Accordingly, this Adversary Proceeding is a core proceeding.

5.

— This Case is a Core Proceeding Pursuant to 28 U.S.C. § 157(b)(2)(E)

7. This Adversary Proceeding includes causes of action seeking the appointment of a receiver for Auer, so that in turn said receiver may locate and turnover property of the several estates. See 28 U.S.C. § 157(b)(2)(E). Debtors have alleged that Auer has removed construction materials from Debtors’ Hotel Properties and refused to return same to Debtors. In addition to monetary damages, Debtors’ seek return of any of Debtors’ property, now property of the several estates. Accordingly, this Adversary Proceeding is a core proceeding.

— This Case is a Core Proceeding Pursuant to 28 U.S.C. § 157(b)(2)(K)

9. This Adversary Proceeding includes causes of action seeking determination of the validity and extent of liens against property of the estate. See 28 U.S.C. § 157(b)(2)(K). Auer has filed multiple Affidavits of Mechanic’s Liens (“Liens”) against Debtors’ Hotel Properties. A significant portion of Debtors’ claims and counter-claims in this Adversary Proceeding seek to invalidate the Liens. Accordingly, this Adversary Proceeding is a core proceeding.

— This Case is a Core Proceeding Pursuant to 28 U.S.C. § 157(b)(2)(O)

11. This Adversary Proceeding will have an impact on the liquidation of the assets of the estate and the adjustment of the debtor-creditor relationship. See 28 U.S.C. § 157(b)(2)(O). To illustrate, “The Fifth Circuit applies 28 U.S.C. § 157(b)(2)(O) when the controversy is ‘inextricably tied to the bankruptcy proceeding because it affects the liquidation of assets.’” *In re Hallwood Energy, L.P., et al.*, 2009 WL2601294 at *7 (Bankr. S.D.Tex. 2009) (citing *In re Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993)).

12. Any awards entered for or against Debtors will directly affect the amount of funds available to fund a Chapter 11 Plan, which Plan must address the multitude of subcontractors who have filed Affidavits of Mechanic’s Liens against Debtors’ Hotel

Properties. However, more importantly, the outcome of this Adversary Proceeding may very well be dispositive as to whether Debtors will be able to reorganize under Chapter 11. Due to the large amount of damages at stake in this Adversary Proceeding, a judgment entered against Debtors would likely force Debtors to abandon reorganization under Chapter 11, instead converting their cases to ones under Chapter 7 and moving forward with liquidation of the several estates. Therefore, this Adversary is “inextricably tied” to the bankruptcy proceedings, and as such, this Adversary Proceeding is a core proceeding. Also, as recited above in regard to 28 U.S.C. § 157(b)(2)(B), any awards for or against the N.D.Tex. Plaintiffs must be reconciled with any awards for or against the N.D.Tex. Plaintiffs entered in the Northern District Adversaries. Accordingly, this Adversary is a core proceeding.

13. This notice is filed with the clerk of the Bankruptcy Court rather than the clerk of the United States District Court under General Order 2005-6, the General Order of Reference, filed among the records of the United States District Court for the Southern District of Texas.

14. Debtors consent to entry of final orders in this matter by the judge for the United States Bankruptcy Court for the Southern District of Texas, Houston Division.

15. Attached to this notice of removal as Exhibit “A” is a Certificate of Interested Parties.

16. Copies of all state court pleadings and processes are being filed contemporaneously with this Notice. Exhibit “B” attached to this Notice is an index of those pleadings being filed.

Q. MOTION TO TRANSFER VENUE

18. The disposition of certain contested matters in the several bankruptcy cases may be potentially dispositive of some of the claims or interests asserted in this Adversary Proceeding, and the disposition of this Adversary Proceeding may be potentially dispositive of some of the claims or interests asserted in the several bankruptcy cases – thus, it is in the interest of judicial economy and consistent rulings on matters pertaining to the administration of the bankruptcy estate for all matters to be removed to the United State Bankruptcy Court for the Northern District of Texas, Amarillo Division, where the underlying bankruptcy cases are now pending.

19. This case should be removed directly to the Bankruptcy Court for the Northern District of Texas, Amarillo Division, rather than the United States District Court for the Northern District of Texas, Amarillo Division, under the Order of Reference of Bankruptcy Cases and Proceedings filed among the records of the United States District Court for the Northern District of Texas.

20. A motion to transfer venue in a “proceeding under title 11” is governed by 28 U.S.C. § 1412. Alternatively, 28 U.S.C § 1404(a) governs a motion to transfer venue for a case “related to a proceeding under title 11.” *Edge Petroleum Operating Co., Inc. v. Duke Energy Trading & Mktg., L.L.C.*, 311 B.R. 740, 743 n.1 (S.D.Tex. 2003). “Regardless the inquiry is the same under either statute so the Court’s analysis would not be any different” under 28 U.S.C. § 1412 or 28 U.S.C. § 1404(a). *Id.*

28 U.S.C. § 1404(a) contains one additional requirement that the action sought to be transferred could have been originally brought in the district in which defendant seeks a transfer. *Sabre Tech., L.P. d/b/a Skyline Displays of Houston v. TSM Skyline Exhibits, Inc., et al.*, WL4330897 at *9 (S.D.Tex. 2008). In this Adversary Proceeding, Debtors are corporations with their corporate headquarters located in the Northern District of Texas. With the exception of Debtor Borger Hospitality, Inc.’s hotel property located in Martin

County, Texas, all of Debtors' Hotel Properties are located in the Northern District of Texas.³

21.

Also, "under 28 U.S.C. § 1409(a), a proceeding arising under or related to a bankruptcy may be brought in the district where the bankruptcy proceeding is pending." *Id.* Therefore, because the Northern District of Texas is the district in which Debtors' corporate headquarters are located, as well as the district in which Debtors' Chapter 11 bankruptcy cases are pending, the Northern District of Texas would have been a proper venue for this Adversary Proceeding to have been originally filed.

22. As a preliminary matter, "there is a strong presumption in favor of placing venue in the district court where the bankruptcy case is pending." *Id.* at *8. As for the required factors, both 28 U.S.C. §§ 1404(a) and 1412 provide that a district court may transfer a case (1) in the interest of justice, or (2) for the convenience of the parties.

i. Interest of Justice

2. In analyzing the "interests of justice" under 28 U.S.C. § 1412, there is no difference between the factors as applied under 28 U.S.C. § 1412 or 28 U.S.C. § 1404(a). *Edge Petroleum Operating Co., Inc. v. Duke Energy Trading & Mktg., L.L.C.*, 311 B.R. 740, 743 n.1 (S.D.Tex. 2003). "The Fifth Circuit has explained that the 'interest of justice' inquiry involves considering four public interest factors: '(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or the application of foreign law." *Sabre Tech.*, WL4330897 at 9 (citing *In re Volkswagen*, 371 F.3d 201, 203 (5th Cir. 2004)).

— Court Congestion is Not a Relevant Factor in This Case

4. With regard to the first factor, "court congestion," there is nothing to suggest that the Bankruptcy Court for the Northern District of Texas, Amarillo Division, has any greater a caseload than this Court. Further, "promoting the efficient administration of the bankruptcy estate is an important factor. Allowing the bankruptcy court to adjudicate the core claims involved in this case, as well as the other related claims, promotes the efficient administration of the bankruptcy estate." *Id.* (internal citations omitted).

— Venue Should be Transferred Due to Localized Interests in the Northern District

7. The second factor, "localized interests," weighs in favor of transfer. Debtors are corporations with their corporate headquarters located in the Northern District of Texas. Three of the four of Debtor's Hotel Properties, along with all of the Related Debtors' Hotel Properties, are located in the Northern District of Texas. Of the approximately 30 lawsuits filed by unpaid subcontractors who provided labor and/or materials for construction of the Debtors' and Related Debtors' Hotel Properties ("Subcontractor Lawsuits"), the overwhelming majority are pending, stayed by Debtors' filing of Suggestions of Bankruptcy, in counties located in the Northern District of Texas. The breakdown of those lawsuits is as follows:

3 However, Borger Hospitality is the only entity among the Debtors and Related Debtors to own two properties – the one in Martin County (Western District of Texas), and one in Scurry County (Northern District of Texas).

25 of the 30 Subcontractor Lawsuits are pending in counties located in the Northern District of Texas⁴

8.

9. 22 of the 25 Subcontractor Lawsuits pending in counties located in the Northern District of Texas specifically include Auer as a named defendant

10.

11. 16 of the Subcontractor Lawsuits are pending in counties located in the Amarillo Division of the Northern District of Texas

12. The majority of the Subcontractor Lawsuits are predicated on subcontractors' mechanic's liens ("Subs' Liens") on the Debtors' and Related Debtors' Hotel Properties. In order to address many of the Subs' Liens, Debtors and Related Debtors will be forced to either: 1) remove the Subcontractor Lawsuits to the Bankruptcy Court for the Northern District, Amarillo Division; or 2) initiate original adversary proceedings in the Bankruptcy Court for the Northern District, Amarillo Division. Therefore, regardless of the manner in which Debtors and Related Debtors choose to address the Subs' Liens, the end result will be multiple adversary proceedings, all taking place in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.

13. Of the approximately 38 total lawsuits generated by the business dealings between Auer and Debtors and Related Debtors, only *FOUR* were located in the Southern District of Texas, more specifically, Montgomery County. Further, those four cases were only in Montgomery County because of a venue provision, the validity of which was the subject of much dispute in the state court litigation, contained in some of the contracts between Debtors and Auer. Accordingly,

4 Of the five Subcontractor Lawsuits pending outside of the Northern District of Texas, three are pending in Denton County, which is located in the Sherman Division of the Eastern District of Texas. While not technically within the boundaries of the Northern District of Texas, litigation pending in Sherman, Texas, would certainly have more localized interest in the Northern District than the Southern District of Texas.

the Northern District of Texas, particularly the Amarillo Division, has the overwhelming substantive “localized interest” in this Adversary Proceeding.

— The Courts’ Familiarity with Governing Law is Not a Relevant Factor in This Case

15. The third factor is neutral. This case involves Texas law, and from this point forward, will involve bankruptcy law. Both the Northern and Southern Districts of Texas have Standing Orders of Reference referring bankruptcy cases to the bankruptcy courts within those districts, so a bankruptcy judge will interpret bankruptcy law in this case.

16.

17.

— There Are no Conflicts of Law, But There is Potential For Conflicting Judgments if Venue is Not Transferred

There do not appear to be any conflicts of law problems as between this case being tried in the Bankruptcy Court for the Southern District of Texas, Houston Division, or the Bankruptcy Court for the Northern District of Texas, Amarillo Division. However, Debtors would note that there does exist a serious potential for differing rulings, and consequently differing awards of damages, as between the exact same parties, litigating the exact same claims. Because the Northern District Adversaries, one of which was removed from state court directly to the Amarillo Division,⁵ are already before the Northern District of Texas, those cases will be tried in the Northern District of Texas. If this Adversary Proceeding were to be tried before this Court, the claims and counter-claims herein may be disallowed in the Northern District, while at the same time be allowed in the Southern District, or vice versa.

In addition to the allowance or disallowance of a claim against the N.D.Tex. Plaintiffs, each Court’s rulings would also determine whether any such allowed claim would be secured or unsecured. Accordingly, this Adversary Proceeding should be transferred to the Northern District of Texas, Amarillo Division, in order to avoid forcing two of the four Debtors in this Adversary to formulate

5 The Honorable Robert L. Jones presides over both the Amarillo and Lubbock Divisions of the Bankruptcy Court for the Northern District of Texas. In light of that fact, along with the fact that two additional Adversary Proceedings, *Perryton Hospitality, Inc. v. Auer Corporation* and *Childress Hospitality, L.P. v. Auer Corporation*, were removed directly to the Bankruptcy Court in Amarillo, even if the intra-district transfer were to be denied in the case pending in the Lubbock Division, similar rulings would be reached in all four cases because they are before the same judge, Judge Jones.

and implement Chapter 11 Plans with the possibility of conflicting secured and unsecured, allowed and disallowed, claims.

— Two of the four aforementioned factors indicate the propriety of transferring this case to the Northern District of Texas. The remaining two factors are neutral. Accordingly, under the “interest of justice” prong of 28 U.S.C. § 1412, this Court should transfer venue of this case to the Northern District of Texas, Amarillo Division.

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xxiv. Convenience of the Parties

25. “Courts should evaluate the convenience of the parties and witnesses based on certain private interest factors. These factors include: ‘(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.’” *Sabre Tech.*, WL4330897 at *10 (citing *In re Volkswagen*, 371 F.3d at 203). “Courts also consider the plaintiff’s choice of forum, the place of the alleged wrong, and the possibility of delay or prejudice if transfer is granted.” *Id.* (citing *In re Horseshoe Entm’t*, 337 F.3d 429, 433-34 (5th Cir. 2003)). However, “delay or prejudice” must be shown by clear and convincing evidence by any opponent of transfer, and “the plaintiff’s choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive nor determinative.” *Horseshoe Entm’t*, 337 F.3d at 434.

— Proof Will be More Easily Accessible in the Northern District of Texas

27. The first enumerated factor, “ease of access to proof,” indicates a need to transfer the case to the Northern District of Texas. The witnesses and records of Debtors are located in the Northern District of Texas. While Auer’s records, and some of its witnesses, may be located in the Southern District of Texas, the majority of the witnesses, namely the subcontractors and material suppliers involved in the Subcontractor Lawsuits, are presumptively located near the construction projects at issue — in the Northern District of Texas. As shown above, more than 80% of the Subcontractor Lawsuits are pending in counties located in the Northern District of Texas, and more than 70% of the Subcontractor Lawsuits in the Northern District include Auer as a named Defendant. The remaining 20% of the Subcontractor Lawsuits, five cases total, are split 3 – 2 between the Eastern and Western Districts of Texas. But, perhaps most telling, is the fact that ZERO subcontractors have filed suit in the Southern District of Texas. None. Therefore, long before Debtors filed their Chapter 11 Petitions, Auer was already involved in litigation all across the Northern District of Texas. Accordingly, a transfer will decrease cost for Debtors and subcontractors, and will likely have a neutral impact on the costs of Auer.

— Compulsory Service is Likely to be More Available in the Northern District

29. The second factor, availability of compulsory service, is unknown at this time. Debtors are unaware of any reluctant witnesses who would refuse to voluntarily appear in the Northern District of Texas. However, because the majority of witnesses appear to reside in the Northern District, Debtors propose that it would be more difficult to secure witnesses for trial of this Adversary Proceeding in the Southern District than the Northern District. As stated above, a substantial portion of the witnesses in this Adversary Proceeding will be the subcontractors who provided labor and materials for construction of Debtors’ Hotel Properties. More than 80% of those subcontractors filed their lawsuits against Auer, Debtors and Related Debtors in the Northern District of Texas. Accordingly, compulsory service is likely to be more available in the Northern District than the Southern District.

— Cost of Attendance for Witnesses Will be Less in the Northern District of Texas

31. The third factor, cost of attendance for willing witnesses, militates in favor of transfer to the Northern District of Texas. “[T]he witnesses that would likely testify in this case will also be involved in [Debtors’] bankruptcy litigation, which is currently pending in the [Northern] District of Texas. Therefore, witness travel costs can be reduced if all related litigation occurs in one location.” Sabre Tech., WL4330897 at *10. The subcontractor witnesses will be involved in Debtors’ Chapter 11 cases, irrespective of the existence of this Adversary Proceeding. At a minimum, the subcontractors will be forced to file claims, and defend against objections to such claims if necessary, in Debtors’ bankruptcy cases in the Amarillo Division of the Northern District of Texas. Further, it is likely that Debtors and Related Debtors will be forced to file adversary proceedings against some of the subcontractors in order to invalidate the subcontractors’ liens. In short, most, if not all, of the witnesses in this Adversary Proceeding will be forced to travel to the Bankruptcy Court in Amarillo, regardless of the venue of this Adversary. Accordingly, transferring this Adversary Proceeding to the Amarillo Division of the Northern District of Texas will reduce costs for all parties involved.

— Making Trial Easy, Expeditious and Inexpensive

33. Finally, the fourth factor, making trial of the case easy, expeditious and inexpensive, leans toward transferring the case to the Northern District of Texas.

34. “As stated earlier, there is a strong presumption under § 1412 that venue should be in the court where the bankruptcy proceeding is pending. Although some causes of action may not be subject to § 1412, the logic behind the presumption is nevertheless persuasive in this case. Because all of the causes of action in this case are all either core bankruptcy proceedings or so closely related that they form part of the same controversy, they can most easily, expeditiously, and inexpensively be litigated in the bankruptcy court in the [Northern] District of Texas.

35. Id. at *11.

36. This Adversary Proceeding represents merely a portion of the proceedings encapsulated within Debtors’ and Related Debtors’ Chapter 11 bankruptcy cases. It would be a tremendous burden on the several estates, as well as most of the other parties involved, to conduct this Adversary Proceeding in the Southern District of Texas. The claims and counter-claims between Auer, Debtors and Related Debtors are virtually identical in every lawsuit comprising the Auer Litigation. The easiest, most expeditious and inexpensive manner in which to resolve this Adversary Proceeding would be for it to be tried in conjunction with the four identical adversary proceedings already pending in the Northern District of Texas, Amarillo Division.

XXXVII.PRAYER

XXXVIII. WHEREFORE, PREMISES CONSIDERED, Debtors respectfully request that this Court grant their Motion to Transfer Venue, and order that this Adversary Proceeding be transferred to the Bankruptcy Court for the Northern District of Texas, Amarillo Division.

Respectfully submitted,

s/ J. Randal Bays

J. Randal Bays, attorney-in-charge
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CERTIFICATE OF SERVICE

This is to certify that on this day of April, 2010, a true and correct copy of the
above and foregoing document was sent by certified mail return receipt requested to the
following:

Donna C. Kline

Attorney at Law

16144 Bethel Road

Montgomery, TX 77356

J. Randal Bays

EXHIBIT A**CERTIFICATE OF INTERESTED PERSONS**

BORGER PROPERTIES, INC. CASE NO. 10-20168-RLJ-11	Elliott Electric, Inc. d/b/a Elliott Electric c/o Robert L. Eden, Esq. Matthews, Stein, Shiels, L.L.P. 8131 LBJ Freeway Suite 700 Dallas, TX 75251-1352	(p)FIRST NATIONAL BANK DBA BANK OF COMMERCE P.O. BOX 2750 PANAMA TX 79066-2750
624 S. Polk, Suite 100 Amarillo, TX 79101-2364	American Glass & Mirror 503 S. May Madisonville, TX 77864-2559	Arrow Machinery 1221 Martin Luther King Blvd Oklahoma City, OK 73117-4299
Associated Supply Company, Inc. c/o Scott W. Sharp Timberlake, Weaver and Sharp, PC 1408-A Buddy Holly Ave. Lubbock, TX 79401-4054	Associated Supply Company, Inc. C/O Timberlake, Weaver & Sharp, PC 1408-A Buddy Holly Ave. Lubbock, TX 79401-4054	Benchmark Fabricating, LLC P.O. Box 68 Dudley, GA 31022-0068
Borger Properties, Inc. 1424 Riverside Rd. Roanoke, TX 76262-4409	CDS Technology Inc. 5365 1st Street Katy, TX 77483-2506	Chero-Key Piping Company 1800 Sherwood Forest Suite D-1 Houston, TX 77043-3019
Chetan Parikh 1420 Riverside Road Roanoke, TX 76262-4409	Contesse Inc. 2950 W. 500 S. Unit 15 Salt Lake City, UT 84104-3513	Craig, Terrill, Bale & Grantham LLP 1500 Broadway, Ste 400 Lubbock, TX 79401-3100
Elliott Electric Supply C/O Mathews, Stein, Shiels 8131 LBJ Freeway, Ste 700 Dallas, TX 75251-1352	Elliott Electric, Inc. d/b/a Elliott Electric Robert L. Eden MATTHEWS, STEIN, SHIELS, L.L.P. 8131 LBJ Freeway, Suite 700 Dallas, Texas 75251-1352 (972) 234-1750 Telecopier	Flow Law Firm P.O. Box 2673 Amarillo, TX 79105-2673
Govind Patel 3312 Dickerson Road Nashville, TN 37207-2955	Harish L. Patel 1424 Riverside Rd. Roanoke TX 76262-4409	ICI Paints 21033 Network Place Chicago, IL 60673-0001
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